STATE OF MICHIGAN
IN THE SUPREME COURT
[Appeal From Cheboygan County Circuit Court, Honorable Scott L. Pavlich]

JAMES LITTLE and **CHERYL LITTLE**, Husband and Wife; **STEVEN RAMSBY; MARY KAVANAUGH**; and **STANLEY W. THOMAS** and **NANCY G. THOMAS**, Husband and Wife; **MICHAEL McCLUSKY** and **GLADYS McCLUSKY**, Husband and Wife, and **ANN SKOGLUND**, Plaintiffs/Counter-Defendants/Appellees -vs- **SUPREME COURT APPELLANTS**	Lower Court File No: 98-6480-CH Honorable Scott L. Pavlich
BETTY H. HIRSCHMAN; GERALD W. CARRIER and SALLY ANN CARRIER, Husband and Wife; FRANCIS J. VanANTWERP and ELIZABETH VanANTWERP, Husband and Wife, JOHN P. VIAU and GENEVIEVE GUENTHER VIAU, Husband and Wife; and MASON F. SHOUDER and JEAN ANN SHOUDER, Husband and Wife, Defendants, and	Court of Appeals Docket #227751 **SUPREME COURT DOCKET #121836**
BETTY H. HIRSCHMAN; GERALD W. CARRIER and SALLY ANN CARRIER, Husband and Wife; JOHP P. VIAU and GENEVIEVE GUENTHER VIAU, Husband and Wife, Defendants/Counter-Plaintiffs, and **BETTY H. HIRSCHMAN**, Defendant/Counter-Plaintiff/Appellant/ **SUPREME COURT APPELLEE**	

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APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

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INTRODUCTION

[Parenthetical page numbers refer to the APPENDIX filed with Appellants' original Brief on Appeal]

This case is primarily concerned with the rights of the back lot owners of lots on the Cheboygan River within the 1913 Plat of Ye-Qua-Ga-Mak as those rights relate to the continued use of Lakeside Park's beach area located on Mullett Lake, all such use being consistent with the plat dedication of said Parks: ". . .to the owners of the several lots" (Appendix, p 175a), and consistent with the use of that beach area since at least the 1940's (Appendix, p 214a).

The Findings of Fact of the Trial Court (which were not appealed and which are clearly substantially supported by the entire record as to the use of this beach area) were as follows:

> "The testimony and proofs established that there are only two sandy beach areas on the plat. Those are the public access area ro the far westerly end of the plat as well as the sandy beach area located in front of Defendant, Betty Hirschman's summer home on Lots 46 & 47. this beach in front of the Hirschman residence is part of the area designated on the plat as the lakeside park and has been regularly used by lot owners in the plat for sunbathing, swimming, picnicking and other beach related activities for as long as the parties can remember and dating back at least to the 1940s. This beach was accessed by an alley between Lots 47 and 48. There has been a table and bench located on the beach side of this alley since approximately 1980 and used by the various lot owners to picnic, relax and store their towels while swimming. There was also an area for a campfire to the east of this alley way on the beach again located in that general area for a period in excess of 20 years prior to litigation.
>
> The lots to the east of the alley, between Lots 47 and 48 along the water's edge are noticeably different in appearance and use. Those properties have break walls with lawns and grassy areas to the water's edge and have not been used as a beach area. It appears that during the summer months, on rare occasions, an individual may walk along the shoreline along these grassy areas but the identify of these individuals is unknown.

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> The riverside park has historically been used by the various lot owners for fishing and foot traffic. The areas of the riverside park also appears to be a grassy areas with no beaches with some seawalls, docks and boat wells on the river's edge."
>
> Lower Court Opinion and Order of 2/25/00 (Appendix pp 214a - 215a)

This use of the beach area was actively participated in, for decades, by Appellee Hirschman and, for decades, was not objected to by her, or her predecessor in title. (Appendix pp 186a, 188a, 190a, 195a, 198a, 208a). Although Defendant Hirschman stated that the beach use changed -- for the worst -- from around 1995 forward (Brief on Appeal - Appellee, p 5), Co-Defendant Carrier's testimony was the opposite, in that he perceived not much beach activity in the last ten years. (Appendix, p 168a)

The statement contained on page 4 of Appellee's Brief on Appeal which indicated that the strip of land on Lakeside Park: ". . .is a continuous sandy beach" does not fairly or accurately represent the nature of Lakeside Park. As shown by various Exhibits, including Defendants' Exhibit K consisting of an aerial photograph, and as readily observed first hand, the only true beach area (other than the public beach at the west end of the Plat) is the beach in front , or south, of Lots 46 & 47,

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which beach area is not 50 feet, but extends from the southerly lot line approximately 100 feet to the water's edge.[1] / [2] / [3]

Appellee Hirschman, and the other original Defendants, filed an action against the Cheboygan County Road Commission seeking - and obtaining - a Circuit Court Order vacating the alleys, without naming therein any of the parties required to be named pursuant to the Land Division Act, MCL 560.253 (1). The alley access to the beach area of Lakeside Park used by Appellants for decades was immediately barricaded and a "No Trespassing" sign placed on a tree. (Appendix, pp 32a-34a). The instant litigation resulted. The intent of Defendants in posting the "No Trespassing" sign was clearly to preclude the decades-long use of the beach by Appellants, (Appendix pp 162a-164a, 172a, 174a) again, without following -- in their Counter-Claim -- the procedures required by the Land Division Act. The Trial Court rejected Appellee's attempt to take for herself the long-standing property rights involving the use of the beach area of Lakeside Park, held by Appellant back lot

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1 Presumably this greatly expanded beach area of Lakeside Park resulting from the sea walls along the Cheboygan River and the wall constructed by the Corp. of Engineers.

2 In addition to the aerial photo, all the other photos, the video and all the testimony, the Trial Court personally drove through the plat (Appendix, p 211a)

3 In Footnote 9 Appellee speculates that the original property owner would not have chosen these lots (46 & 47) "if she believed that the beach in front of them would serve as the community beach". This is sheer speculation, unsupported by any evidence. As readily observed these lots have both lakeside and riverside access and have a majestic view of the lake.

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owners pursuant to the plat dedication and used for traditional beach activities since at least the 1940's (not use for just "the last several years"). (Appellee's Brief on Appeal, p 8) The Trial Court rejected that attempt and affirmed Appellants' long-held and long-used rights of use of the beach area of Lakeside Park.

ARGUMENT

I.

This dedication of the parks contained within the Plat of Ye-Qua-Ga-Mak to the various lot owners was, and is, legal under Michigan case law and should be affirmed by this Court.

There is a substantive, un-reversed body of case law in Michigan extending from ***Feldman v Monroe Twp. Board***, 51 Mich App 752; 260 NW 2d 628 (1974) back to this Court's Opinion in ***Schurtz v Wescott***, 286 Mich 692; 282 NW 870 (1938) affirming plat owners' rights of use of privately dedicated parks and common areas. That body of case law requires reversal of the Court of Appeal's decision in this case which holds contrary to that body of case law.

Appellee attempts to minimize this body of case law stating, for example, on page 17 of Appellee's Brief:

> "But this Court did not *unequivocally* hold that the private dedications were valid . . . In short, *Schurtz* provides little guidance on this issue."

Although that might be Appellee's reading of those cases, that reading appears far removed from an objective reading of those cases. For example, the State Bar of Michigan's Land Title Standards Fifth Edition, Comment B to Standard 13.3 states as follows:

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> "**Comment B**: Before the Subdivision Control Act of 1967, the cases are in conflict regarding the *effect* and validity of a dedication for other than public use. Compare *Kraushaar v Bunny Run Realty Co.,* 298 Mich 233, 298 NW 514 (1941), indicating that a dedication of platted land for other than public purposes to the exclusion of the public is not possible, with *Schurtz v Wescott*, 286 Mich 691, 282 NW 870 (1938), and *Feldman v Monroe Township Board,* 51 Mich App 752, 216 NW 2d 628 (1974), recognizing the validity of private dedications."

In short, ***Shurtz*** supra, ***Kirchen v Remenga***, 291 Mich 94; 288 NW 344 (1939), ***Fry v Kaiser***, 60 Mich App 574; 232 NW 2d 673 (1975) and ***Feldman***, supra, all affirm, as a lawful use, the lot owners' continued right to use land privately dedicated.

Back lot owners' continued right of use of lands pursuant to private dedications, that were challenged as an improper grant of "riparian rights", were also affirmed by this Court in ***Theis v Howland***, 424 Mich 282; 380 NW 2d 463 (2002) and by the Court of Appeals in ***Dobie v Morrison***, 227 Mich App 536; 575 NW 2d 817 (1998) and ***Little v Kin***, 249 Mich App 502; 644 NW 2d 621 (2002).

As with ***Shurtz***, supra., Appellee, in this case, attempts to distinguish, or minimize, this body of case law by focusing on the word "use". Specifically, on page 18 of Appellee's Brief on Appeal, Appellee states:

> "The plat of Yequagamak contained a dedication of the parks to the several owners – it did not contain a dedication to the use of the owners. . . Thus, the private dedication of the parks is incapable of being construed as granting an easement. . Absent the grant of an easement, the private dedication fails under *Kraushaar.*"

Misinterpreting further, Appellee goes on to state, on page 19:

> "The intent of the plattors is only pertinent when attempting to define the scope of a valid grant of property rights – it cannot be a substitute for legal prerequisites for conveying such rights."

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That analysis and attempt to reject this body of case law is simply an incorrect view of this Court's clear Opinion in ***Theis v Howland***, supra. There, this Court dealt with a dedication of driveways, walks and alleys to the joint use of all of the owners of the Plat. This Court understood and clearly defined "riparian rights" and then stated that the Defendants' land, in that case, did not touch the shore of Gun Lake and was not "riparian". (424 Mich 287, 288) Defendants there argued that they were co-owners of the walks and alleys in common with other lot owners. This Court clearly concluded that whether Defendants were owners, or merely held an easement interest, Defendants' rights of use still existed. As this Court stated on page 289:

> "The ownership of walk and alleys and the scope of the dedication of these lands are inter-related, but distinct inquiries."
> ID, p 289

This Court then made a separate, detailed analysis and conclusion as to each inquiry in that case. However, for each inquiry, the operative premise was plattor intent.

In ***Theis***, supra., the plattor's dedication of the walks and alleys to: ". . .the joint use of all the owners of the plat" (424 Mich 289) led this Court to conclude that an easement, rather than a fee interest, was conveyed. Here, however, the plat dedication to the various lot owners would suggest a conveyance of a fee interest because the limitation inherent in the word "use" is not here present. Whether Plaintiffs here have an ownership interest or an easement interest under the plattor's intent analysis required by ***Theis***, supra., it is clear that the plattor's intent was to convey a lawful interest. That plattor intent should be here affirmed as in ***Theis v Howland***. supra. ***Martin v Redmond***, 248 Mich App 59; 638 NW 2d 142 (2001) and

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Kraushaar v Bunny Run Realty Co., 298 Mich 233; 298 NW 514 (1941) should be reversed, or modified, as necessary, consistent with this Court's Opinion in ***Theis***, supra and ***Shurtz***, supra. The findings and conclusions of the Trial Court, as to the scope of the use of the beach area of Lakeside Park, are fully supported by the record, and are further fully supported as a matter of law under ***Theis***, supra.

II.

Appellants' reliance upon the plat dedication which had Auditor General approval, pursuant to 1887 PA 309, is proper and the private dedication is lawful under that Act.

As specifically set forth on page 1 of the Michigan Department of Consumer and Industry Services Amicus Curiae Brief, hundreds of Plats approved by the Auditor General as conforming to 1939 PA 91 contained dedications or reservations of land for the use of less than the general public by the time of the 1913 Plat dedication with which this case is involved. The detailed analysis of the legislative history of this Act, and the substantive body of cases affirming plats with private dedications (set forth on Page 7, 8, 9 & 10 of the Michigan Department of Consumer and Industry Services Amicus Curiae Brief), fully support a conclusion that, under this statute, this Dedication was valid and legal.

For ninety (90) years under this Plat (and similar periods of time under many other Plats), lot owners have relied upon the legality of these private dedications in the purchase and sale of lots. This reliance is consistent with the harmonious reading of the statute as a whole, construed in light of history and common sense,

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Arrowhead v Livingston County Road Commission, 413 Mich 505, 516; 322 NW 2d 702 (1982), and is consistent with the deference that should be properly given to state agencies' interpretation and construction of the law, when not in conflict with the spirit and purpose of the Legislature and with full knowledge of the facts and circumstances, during the late 1800's and early 1900's. ***Owosso Board of Education v Goodrich,***, 208 Mich 646, 652; 175 NW 1009 (1920). Private dedications are consistent with the spirit and purpose of the Legislature as evidenced by the Land Division Act, MCL 560.253 (1). The dedication in this Plat should be affirmed as a lawful dedication under the statute by which this Plat was created, for the reasons set forth here and set forth in the Amicus Brief of the Michigan Department of Consumer and Industry Services.

III.

The entire record equitably requires reinstatement of the Trial Court's Opinion and Order.

The Trial Court's Findings of Fact were not appealed. They are fully supported by the record as a whole. Those Findings of Fact, not appealed, fully support a ruling in favor of Appellants allowing the continued right to use of the beach area of Lakeside Park and their right of use of the alleys, all under numerous equitable legal theories including *estoppel* and *laches*. As with issues of law, equitable relief in reviewed *de novo*. ***Attorney General v John A. Biewer Co.Inc.***, 140 Mich App 1, 12, 13; 363 NW 2d 712 (1985). Further, issues not raised below, if necessary to a proper determination of the case, will be considered on appeal. ***Richards v Pierce***, 162 Mich App 308, 316; 412 NW 2d 725 (1987); ***Loper v Cascade Twp.,*** 135 Mich App 106,

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111; 352 NW 2d 357 (1984); and ***Providence Hospital v National Labor Union Health and Welfare Fund***, 162 Mich App 191, 195; 412 NW 2d 690 (1987). If the interest of justice requires consideration on appeal of an issue of law clearly known to the State Bar of Michigan but not raised at trial, the interest of justice further requires consideration of those equitable defenses to the issues of law which were raised at trial, and testified to in defense to challenges at law and for which Findings of Fact were made, and are now necessary to a proper determination of this case. Appellants' rights of use as determined by the Trial Court should be affirmed in their entirety.

RELIEF REQUESTED

For the reasons set forth herein, it is respectfully requested that the Opinion of the Court of Appeals be reversed and that the Opinion, Order and Judgment of the Trial Court be reinstated in its entirety. Further, it is requested that ***Kraushaar v Bunny run Realty Co.,*** supra. and ***Martin v Redmond***, supra., be reversed to the extent necessary – as determined by this Court – in light of ***Shurtz v Wescott***, supra. and ***Theis v Howland***, supra.

Respectfully submitted:
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Dated: June 26, 2003
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